

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB 8/7/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Intercontinental Chemical Corporation

Serial No. 75/168,541

David J. Josephic of Wood, Herron & Evans for applicant.

Barbara A. Gaynor, Trademark Examining Attorney, Law Office
104 (Sidney I. Moskowitz, Managing Attorney).

Before Quinn, Chapman and Wendel, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed to register the term
OSCILLATOR for "print screen cleaning machines."¹ The
application originally was filed seeking registration on
the Principal Register, but later was amended to the
Supplemental Register.

The Trademark Examining Attorney has refused
registration under Section 23 of the Trademark Act on the

ground that the term sought to be registered is generic and, thus, is incapable of identifying applicant's goods and distinguishing them from those of others.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs.² An oral hearing was not requested.

Applicant argues that while the term sought to be registered "may be somewhat descriptive," the term is not generic as it is subject to different meanings.³ Applicant asserts that its clients have come to distinguish applicant's goods from those of its competitors through recognition of the mark OSCILLATOR on applicant's goods.

¹ Application Serial No. 75/168,541, filed September 19, 1996, alleging dates of first use of November 1, 1995.

² With its brief applicant submitted for the first time a declaration of its president, Cameron W. Cord, and a copy of a computerized search report retrieved from the Office's database. The Examining Attorney properly objected to the submission of this evidence as untimely. Trademark Rule 2.142(d); and *TBMP* §1207.01. Accordingly, the evidence has not been considered in deciding this appeal. Further, as the Examining Attorney pointed out earlier during prosecution, the mere listing of third-party registrations was insufficient to make them of record in this appeal. In *re Classic Beverage Inc.*, 6 USPQ2d 1383 (TTAB 1988), and In *re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983). We hasten to add, however, that even if the evidence were considered, it would not be persuasive of a different result in this appeal. As often noted by the Board, each case must be decided on its own set of facts, and the Board is not bound by prior determinations made by Examining Attorneys. While uniform treatment under the Trademark Act is highly desirable, our task here is to determine, based on the record before us, whether applicant's mark is capable of registration.

³ At another point in its appeal brief, applicant asserts that "applicant's mark is a suggestive mark which lacks specific meaning or definite informational quality."

Further, applicant contends that the dictionary meanings fall short in demonstrating that the relevant purchasing public (i.e., "those in the printing industry") views the term as the common name for print screen cleaning machines or for applicant's specific type of oscillating screen cleaning machines. In support of its position, applicant submitted excerpts retrieved from the NEXIS database which, according to applicant, show widespread use of the term "oscillator" in a variety of different industries. Thus, applicant argues, the term has a "multi-layered meaning" which indicates that the term is capable of registration on the Supplemental Register.

The Examining Attorney maintains that the term sought to be registered is generic for printing screen cleaning machines which clean by oscillation. In support of the refusal, the Examining Attorney submitted a dictionary listing for the term "oscillator," and two patents owned by applicant pertaining to the goods identified in the present application.

In order for a term to be registered on the Supplemental Register, it must be capable of serving as an indicator of source. Capability is determined by considering the meaning of the term as applied to the goods, the context in which the term is used on the

specimens filed with the application, and the likely reaction thereto by average purchasers upon encountering the term in the marketplace. In re Sambado & Son Inc., 45 USPQ2d 1312 (TTAB 1997).

A mark is a generic name if it refers to the class or category of goods on which it is used. H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). The test for determining whether a mark is generic is its primary significance to the relevant public. Section 14(3) of the Act; Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); and H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., supra. The Patent and Trademark Office has the burden of establishing by clear evidence that a mark is generic and thus unregistrable. In re Merrill Lynch, Pierce, Fenner and Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). Evidence of the relevant public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. In re Northland Aluminum Products, Inc., 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985).

The term "oscillator" is defined as "a device or machine producing oscillations." *Random House Unabridged Dictionary* (2d ed. 1993).

Also of record are two patents owned by applicant and which cover the machine which is the subject of the involved application. Registration No. 5,566,697 is titled "Oscillator screen cleaning apparatus" and Registration No. 5,769,956 is titled "Method for cleaning a screen by spraying and moving in a repeated continuous oscillating motion." The abstract of the first patent reads, in pertinent part, as follows:

An oscillating screen cleaning apparatus includes an enclosed housing which forms a cleaning chamber having a plurality of spray nozzles positioned therein to spray a printing screen with cleaning solvent. An oscillating mechanism is mounted within the cleaning chamber to move the screen in an oscillating motion in front of the spray nozzles to provide an efficient and effective cleaning of the printing screen. The spray nozzles are arranged in two opposing grid patterns and the screen is oscillated between the grid patterns to provide complete coverage of the screen with spray cleaning solvent.

Throughout the patent, the product is referred to as "oscillator screen cleaning apparatus." In addition, repeated references are made to the "oscillating

mechanism." The second patent includes much of the same discussion.

We find that the term "oscillator" is generic for the type of print screen cleaning machines produced by applicant. The most telling pieces of evidence are applicant's patents wherein applicant itself identifies the product as "oscillator screen cleaning apparatus." This evidence, coupled with the specific meaning of the term "oscillator" when applied to applicant's goods, convinces us that the term is unregistrable. See: *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999); *In re Central Sprinkler Co.*, 49 USPQ2d 1194 (TTAB 1998); and *In re Half Price Books, Records, Magazines, Inc.*, 225 USPQ 219 (TTAB 1984). See also: J. T. McCarthy, 2 *McCarthy on Trademarks and Unfair Competition*, § 12:25 (4th ed. 2000). Applicant claims that its machine with an oscillating mechanism is the only one of its kind, and indeed, applicant owns a patent for its machine. This may very well explain the absence of use of "oscillator" by others in the field. Having said this, our view is that the term "oscillator" should be freely available for use by others in the industry.

We conclude that the term OSCILLATOR is understood by the relevant public as a generic name for applicant's type

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of print screen cleaning machines and, accordingly, is incapable of functioning as a mark indicating applicant as the source of goods of this type.

Decision: The refusal to register is affirmed.

T. J. Quinn

B. A. Chapman

H. R. Wendel
Administrative Trademark
Judges, Trademark Trial
and Appeal Board

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